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CHAMBERS OF CHIEF JUDGE
THOMAS F. HOGAN

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE SEARCH OF)
RAYBURN HOUSE OFFICE BLDG.)
ROOM NUMBER 2113)
WASHINGTON, D.C. 20515)

Case No. 06-231 M-01
Chief Judge Thomas F. Hogan

*25 May he
filed.
Hogan, C.J.
5/24/06
(not under
seal)*

FILED

MAY 30 2006

MOTION OF THE BIPARTISAN LEGAL ADVISORY GROUP OF
THE U.S. HOUSE OF REPRESENTATIVES FOR
(I) LEAVE TO FILE MEMORANDUM OF POINTS AND AUTHORITIES
AS AMICUS CURIAE WITHIN TEN DAYS, AND
(II) ACCESS TO CERTAIN REDACTED PORTIONS
OF THE SEARCH WARRANT AFFIDAVIT

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

Pursuant to Rule 47 of the Federal Rules of Criminal Procedure and Rule 47 of the Local Criminal Rules of this Court, the Bipartisan Legal Advisory Group of the United States House of Representatives respectfully moves for (i) leave to file, no later than Monday, June 5, 2006, a Memorandum of Points and Authorities as amicus curiae in support of the Motion for Return of Property (May 23, 2006), filed by the Honorable William J. Jefferson, U.S. Representative for the 2nd congressional district of Louisiana, and (ii) access to certain redacted portions of the Affidavit in Support of Application of [sic] Search Warrant executed by FBI Special Agent Timothy R. Thibault on May 18, 2006, specifically, paragraphs 129-131 of the Thibault Affidavit. Counsel for the United States and counsel for Congressman Jefferson have consented to the relief sought in this motion (except that counsel for the United States is unable to consent to the access request at this time because of possible Rule 6(e) considerations).

A proposed Order is attached. We request oral argument at the earliest possible time to address, in particular, our request for access to the three redacted paragraphs of the Thibault

Affidavit.

MEMORANDUM OF POINTS AND AUTHORITIES

The Bipartisan Legal Advisory Group presents the institutional position of the House in litigation matters.¹ The Bipartisan Legal Advisory Group's appearance here was triggered by the FBI's execution, on Saturday evening, May 20, 2006, and proceeding into Sunday morning, May 21, 2006, with no advance warning to the House leadership, of a search warrant issued by this Court on Congressman Jefferson's Capitol Hill congressional office. The execution of the warrant – insofar as we are aware, the first to be executed on a congressional office since the Constitution's adoption more than 200 years ago – has created a serious constitutional conflict between the executive and legislative branches of the federal government.

The House's interest in the Court's resolution of this matter arises out of (i) the grave threat the search warrant poses to the separation of powers principle that is the very foundation of our governmental structure, and (ii) the privilege that Members enjoy under the Speech or Debate Clause of the Constitution. U.S. Const., art. I, § 6, cl. 1. That privilege not only protects individual Members but also “insure[s] that the legislative function the Constitution allocates to Congress may be performed independently,” *Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 502 (1975), and “serves the additional function of reinforcing the separation of powers so deliberately established by the Founders.” *U.S. v. Johnson*, 383 U.S. 169, 178 (1966).

The Speech or Debate Clause – which applies to all activities within the “legislative

¹ The members of the Bipartisan Legal Advisory Group are the Honorable J. Dennis Hastert, Speaker of the House; the Honorable John A. Boehner, Majority Leader; the Honorable Roy Blunt, Majority Whip; the Honorable Nancy Pelosi, Democratic Leader; and the Honorable Steny H. Hoyer, Democratic Whip.

sphere” and provides Members with, among other things, a testimonial privilege against being questioned or being compelled to produce documents in criminal as well as civil cases – is critically important to Congress’ relationship with the other two branches of the federal government and is a fundamental pillar of Congress’ independence.

The House’s interest in the Speech or Debate Clause is hardly new. While that interest is normally vindicated when the Office of the General Counsel – which is charged with protecting and preserving the House’s institutional interests – litigates Speech or Debate issues on behalf of individual Members, officers, staffers or committees, the Bipartisan Legal Advisory Group has not hesitated to file as *amicus curiae* in other cases that raise significant Speech or Debate questions where the Office of the General Counsel does not represent a party. *See, e.g., Beverly Enterprises, Inc. v. Trump*, 182 F.3d 183, 186 (3rd Cir. 1999); *U.S. v. McDade*, 28 F.3d 283, 286 (3rd Cir. 1994); *U.S. v. Swindall*, 971 F.2d 1531, 1534 (11th Cir. 1992); *U.S. v. Biaggi*, 853 F.2d 89, 90 (2nd Cir. 1988).²

In short, because the House has a very basic and abiding interest in the questions presented by Congressman Jefferson’s motion – whether the privilege bars the execution of a search warrant on the congressional offices of a Member of Congress under the particular facts of

² The Bipartisan Legal Advisory Group also files as *amicus curiae* in cases that raise non-Speech or Debate issues of institutional concern to the House. In recent years, these have included *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004) (constitutionality of pledge of allegiance); *U.S. v. Eichman*, 496 U.S. 310, 311 (1990) (constitutionality of Flag Protection Act); *Am. Foreign Serv. Ass’n v. Garfinkel*, 490 U.S. 153, 154 (1989) (legality of Executive Branch nondisclosure forms); *Morrison v. Olson*, 487 U.S. 654, 659 (1988) (constitutionality of independent counsel provisions of Ethics in Government Act); *U.S. v. McDade*, No. 95-1785 (3rd Cir. Dec. 8, 1995) (statutory construction of federal illegal gratuities statute); *Cano v. Davis*, 193 F. Supp.2d 1177, 1178 (C.D. Cal. 2002) (application of “exceptional circumstances” test to deposition subpoenas issued to Members of Congress).

this case – its motion for leave to file should be granted.

The request for 10 days to file a Memorandum is appropriate in light of (i) the unprecedented nature of the government's actions, (ii) the seriousness of the constitutional issues at stake, (iii) the importance to the House that the Court receive the House's fully considered views on those issues, and (iii) the fact that the Office of House Counsel, which is quite small (five attorneys), has been consumed, since last Saturday, with other legal issues created by the warrant's execution, including numerous high level negotiations with White House and Justice Department officials.

The constitutional issues to be addressed in this case obviously do not arise in a vacuum. Accordingly, the Bipartisan Legal Advisory Group also requests that it be given access, for purposes of this proceeding, to paragraphs 129-131 of the Thibault Affidavit which was submitted to this Court in support of the Search Warrant Application on May 18, 2006. Those particular paragraphs – redacted from the version of the Affidavit which the FBI released to the public – detail the “lesser intrusive” efforts which the government claims it made to obtain the documents it seized from Congressman Jefferson and which it claims justified the issuance of the warrant in this case – the first in 219 years. Inasmuch as the government itself has pinned its justification for this history-making event, at least in part, on these “lesser intrusive” efforts, the Bipartisan Legal Advisory Group must know what those efforts are if it is to fully apprise the Court of the House's views on the constitutional issues this case presents.

Because there are possible Rule 6(e) considerations to be addressed in connection with the Bipartisan Legal Advisory Group's request for access to the three paragraphs, we request the opportunity to be heard by the Court on this question at the earliest possible time.

CONCLUSION

For all the foregoing reasons, the Bipartisan Legal Advisory Group's motion should be granted.

Respectfully submitted,

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Counsel for the Bipartisan Legal Advisory
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May 26, 2006

CERTIFICATE OF SERVICE

I certify that on May 26, 2006, I served one copy of the foregoing Motion of the Bipartisan Legal Advisory Group of the U.S. House of Representatives for (i) Leave to File Memorandum of Points and Authorities as Amicus Curiae within Ten Days, and (ii) Access to Certain Portions of the Search Warrant Affidavit, by facsimile, e-mail and first-class mail on the following:

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Kerry W. Kircher

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

IN THE MATTER OF THE SEARCH OF)	
RAYBURN HOUSE OFFICE BLDG.)	Case No. 06-231 M-01
ROOM NUMBER 2113)	Chief Judge Thomas F. Hogan
WASHINGTON, D.C. 20515)	

ORDER

UPON CONSIDERATION OF the Motion of the Bipartisan Legal Advisory Group of the U.S. House of Representatives for (i) Leave to File Memorandum of Points and Authorities as Amicus Curiae within Ten Days, and (ii) Access to Certain Portions of the Search Warrant Affidavit ("Motion"), and the entire record herein, it is by the court this _____ day of May, 2006 ordered

That the motion is granted; IT IS FURTHER ORDERED

That the Bipartisan Legal Advisory Group of the U.S. House of Representatives shall file its Memorandum of Points and Authorities as Amicus Curiae no later than Monday, June 5, 2006; IT IS FURTHER ORDERED

That the Bipartisan Legal Advisory Group of the U.S. House of Representatives, as amicus curiae, shall have access to paragraphs 129-131 of the Affidavit in Support of Application of [sic] Search Warrant executed by FBI Special Agent Timothy R. Thibault on May 18, 2006, on terms to be established by this Court.

Honorable Thomas F. Hogan
United States District Judge

Copies to:

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